

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

TELEPHONIC STATUS CONFERENCE

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE KARIN J. IMMERGUT

UNITED STATES DISTRICT COURT JUDGE

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1 TRANSCRIPT OF PROCEEDINGS

2 (January 12, 2022)

3 (Telephonic oral argument:)

4 DEPUTY COURTROOM CLERK: This United States District
5 Court is now in session. The Honorable Karin J. Immergut
6 presiding.

7 THE COURT: Good morning, everyone. We're here on
8 the record in Clark, et al. v. Chad Wolf, et al.

9 Case 20-cv-01436. This was the time set by the Court for oral
10 argument on motion to dismiss filed by Defendants Burger,
11 Cline, Jones, Morgan, Russell, and Smith.

12 Counsel, I'm going to have you state your appearances for
13 the record.

14 First, I'll start with plaintiffs' counsel. Do we have
15 David Park?

16 MR. PARK: Yes, Your Honor. David Park appearing for
17 plaintiff.

18 THE COURT: Okay. And, Mr. Park, who is speaking on
19 behalf of plaintiffs today?

20 MR. PARK: Nadia Dahab.

21 THE COURT: Perfect.

22 And then we have -- I'm just doing it in the order that
23 you're listed -- Jane Moisan.

24 MS. MOISAN: Good morning, Your Honor. Jane Moisan
25 for plaintiff.

1 THE COURT: Thank you.

2 And Michelle Burrows?

3 MS. BURROWS: Yes, Your Honor. I'm here.

4 THE COURT: And Nadia Dahab?

5 MS. DAHAB: Yes. Good morning, Your Honor.

6 THE COURT: Good morning.

7 And then for -- Ms. Dahab, did I get everybody who is
8 supposed to be on the record?

9 MS. DAHAB: I think we also have David Sugerman on
10 the phone with us this morning.

11 THE COURT: All right. Mr. Sugerman, are you there?

12 MR. SUGERMAN: Yes, Your Honor. Good morning.

13 Appearing by phone and muting.

14 THE COURT: All right. Thank you.

15 And, Ms. Dahab, can -- are you able to see and hear me
16 okay?

17 MS. DAHAB: Yes, I am. Thank you, Your Honor.

18 THE COURT: All right. Thank you.

19 And then for defense, do we have Glenn Greene?

20 MR. GREENE: Good morning, Your Honor. Glenn Greene
21 on behalf of the six individual capacity defendants.

22 THE COURT: Thank you.

23 And Michael Clendenen?

24 MR. CLENDENEN: Good morning, Your Honor.

25 Mike Clendenen here for the United States.

1 THE COURT: All right. Thank you. And same for -- I
2 know -- Mr. Clendenen, I think you're going to argue the
3 discovery motion, and Mr. Greene will argue the motion to
4 dismiss; is that correct?

5 MR. CLENDENEN: Yes, Your Honor.

6 THE COURT: So if at any time folks can't hear, do
7 wave and get my attention. I know sometimes we seem to lose
8 connection. Hopefully that won't happen.

9 I thought I would first start by telling you just what my
10 plan is for today's hearing. I did want to start by addressing
11 the defendants' motion to dismiss brought by the supervisory
12 agents, and then I'll go to the motion to compel discovery, and
13 then I would like to just discuss generally, I suppose, the
14 status of the case and the status of service, who has been --
15 has anyone else been served, et cetera, and just where the case
16 is going.

17 So I think for the -- probably it's most helpful if you
18 have what my inclination is for the motion to dismiss brought.
19 Obviously, this complaint is brought under *Bivens* on behalf of
20 those who were allegedly detained without probable cause and
21 subjected to excessive force while in the protest zone in
22 downtown Portland between July 1, 2020, and July 30, 2020.
23 That's the allegation.

24 It is my inclination that the supervisory defendants who
25 are bringing this motion to dismiss are in a similar position

1 to the prior defendants -- Chad Wolf and Ken Cuccinelli.
2 They -- and that it would be -- my inclination is that the case
3 against them should be dismissed because it stretches the
4 implied cause of action under *Bivens* outside of the context in
5 which it was intended, which the Supreme Court has cautioned
6 against, and for the same rationale I dismissed the others,
7 it's my inclination that the same result should happen here.

8 So I think the focus, probably, Ms. Dahab, for you is --
9 and I'll hear both why I'm wrong, from your perspective, and
10 why Mr. Greene thinks I'm right, I suppose. If you could start
11 by -- let me ask you a couple of things that would be helpful
12 to frame your argument, and of course I'll hear -- I'm just
13 saying that's my inclination based on my review of all your
14 pleadings and the record. But it would be helpful to me if you
15 would walk through concretely in the complaint the direct
16 relationship between any of these named defendants and the
17 specific actions you allege, particularly with regard to the
18 named plaintiffs, and I'm still struggling a little bit in this
19 case because it's alleged as a class. Obviously, we have made
20 no determination about whether a class is appropriate or
21 whether even a class is possible for the pure gap under *Bivens*,
22 but that's presumably for a later time.

23 But certainly *Bivens* requires that -- or doesn't allow
24 claims based on vicarious liability or respondeat superior, but
25 there has to be direct involvement of these particular

1 defendants. So if you could focus your argument really on that
2 piece of it, that would be very helpful.

3 The second is with regard to the argument that the
4 defendants make in their briefing, that really this is a
5 challenge to a government policy and, you know, does the
6 government get to use the munitions that they used that you are
7 alleging are part of the excessive force and whether tear gas
8 constitutes an arrest. Those are all issues that seem to go --
9 at least defendants argue those would go to policies that are
10 not appropriate for *Bivens* to apply in that context. That is
11 not an appropriate context in which *Bivens* can be applied and
12 has been -- that's really something for Congress and the
13 Executive Branch -- but not the Courts -- to weigh in on. So I
14 would like you to address that.

15 So those are really some of the main issues I would like
16 you to focus on, but I'll allow you to raise anything you would
17 like to supplement your briefing. Obviously, your briefing is
18 very thorough. So you don't need to repeat everything in your
19 brief. I have read it and -- I've read it also similar --
20 obviously, we've heard these arguments before in the last
21 briefing too. So I'm pretty familiar with the arguments. But
22 anything you can address to -- or say to address my concerns --

23 MS. DAHAB: Great. Thank you for that guidance,
24 Your Honor.

25 Am I starting here or is Mr. Greene starting?

1 THE COURT: Well, I actually thought since I'm going
2 to --

3 MS. DAHAB: You just asked me all those questions.

4 THE COURT: Well, I'm going to let you go first, and
5 then I'll allow Mr. Greene to respond. And then I'll only just
6 have the one time each.

7 So this is your shot to address my concerns. I might have
8 a couple of additional questions as we go through, but I wanted
9 to tee up for you what -- as I went through the briefing,
10 what -- the defendants' briefing -- what my concerns were, but
11 I thought that just to manage the time better, that it would be
12 better for you to go first.

13 MS. DAHAB: Understood.

14 THE COURT: And then rather than giving the
15 government two shots, I would just have the government give me
16 their best argument last.

17 MS. DAHAB: Great. Okay. Perfect. Thank you for
18 that.

19 I will do my best not to repeat what we have laid out in
20 the briefing, understanding that Your Honor has read this
21 briefing or similar briefing twice already; but as the Court
22 knows, under the *Bivens* analysis or the *Abbas*i analysis, this
23 Court has to consider whether, as defendants allege, this is a
24 new context within the meaning of *Bivens* that would expand the
25 scope of *Bivens*.

1 *Bivens*, of course, is a Fourth Amendment case wherein
2 federal narcotics agents were, you know, alleged to have used
3 unconstitutional force in a search and seizure of an
4 individual.

5 In plaintiffs' view -- and I think this is clear from our
6 briefing -- that's the circumstance that we also have here.

7 To be sure, this motion is brought by supervisory-level
8 officers of, I think, different levels within the chain of
9 command that was operating as part of Operation Diligent Valor
10 in July of 2020.

11 I will start -- I think it's probably easiest to start
12 with the complaint, as Your Honor requested, to kind of walk
13 through the specific allegations of the complaint that, in our
14 view, go to these supervisory-level officers.

15 I think, generally, we describe, at least in the -- sort
16 of the introductory paragraph, the identities of these
17 supervisory-level defendants and sort of generally what their
18 roles were within the implementation of Operation Diligent
19 Valor.

20 So if the Court looks to paragraphs 25 through 30 of the
21 second amended class-action complaint, that's where we specify,
22 based on information that we learned from Mr. Clendenen,
23 primarily, over -- or, I guess, we -- we have supplemented this
24 with information we learned from Mr. Clendenen, based on what
25 those individuals were doing over the course of Operation

1 Diligent Valor and what sort of direction and control they
2 have -- or they had over the individuals on the ground here in
3 Portland.

4 THE COURT: Let me ask you about that, Ms. Dahab, and
5 I think the defendants make this argument somewhat in their
6 briefs. You don't dispute that there was a lot of violence and
7 destruction happening in Portland during these very same
8 protests, do you?

9 MS. DAHAB: No, we don't dispute that.

10 THE COURT: You don't dispute that it was legitimate
11 for the agency or supervisors to be at least responding to that
12 force and making sure that there were tactical decisions to
13 protect the Hatfield Courthouse and the area -- surrounding
14 area, do you?

15 MS. DAHAB: No, we don't dispute that.

16 I think our position, though, at least in that respect, is
17 that these individuals had the authority to respond to those --
18 to acts of violence against both the property and the officers.

19 The Constitution, and specifically the Fourth Amendment,
20 doesn't allow them to -- or requires that response to be
21 individualized. So it does not allow them to use broad force
22 against everyone in the crowd, and it does not permit them to
23 use any force against nonviolent or otherwise peacefully
24 protesting individuals, of which we -- of which there were
25 many.

1 THE COURT: So tell me what is -- this is going
2 perhaps far afield from the actual complaint, but it -- but it
3 does crop up in my mind as I review the case. What would be
4 reasonable if you had a crowd that is climbing the fence,
5 trying to write on the building, trying to break in the
6 building, and there are many people doing it? And even though
7 there are many, presumably, innocent protesters in the vicinity
8 as well? When you say "targeted," should they be shot with
9 munitions bullets? That seems like -- the rubber bullets is
10 also conduct that is challenged. So what is the response that
11 plaintiffs think should have happened?

12 MS. DAHAB: Sure. I suppose, by "targeted," I'm not
13 sure I intended to say "individualized." So the response needs
14 to be directed at the violent or otherwise aggressive
15 protesters. Whether, you know -- I think it --

16 THE COURT: How do you individualize when there's a
17 crowd essentially swarming and then there's some innocent folks
18 there too?

19 MS. DAHAB: Sure. I'm not sure. I will say I don't
20 think those are the facts that are alleged in the complaint.

21 I think the officers certainly are given some discretion
22 on the ground, in terms of the amount of force that would be
23 reasonable in the circumstances. I don't think they're
24 allowed -- I don't think use of deadly force -- and in some
25 circumstances the force here was potentially deadly force -- is

1 reasonable in any of those circumstances, unless there is a
2 direct threat to the officers' safety as opposed to the
3 property -- you know, the -- the safety of the property itself.

4 THE COURT: So in --

5 MS. DAHAB: I think -- go ahead.

6 THE COURT: In plaintiffs' view, any less lethal than
7 tear gas to -- just assuming, for the sake of argument, there
8 are groups engaged in violent or destructive conduct --
9 climbing the fence, breaking windows, shooting -- we have seen
10 a lot about what defendants say happened -- assuming, for the
11 sake of argument, those things are occurring among several
12 people in the crowd, what is less lethal or dangerous than tear
13 gas? In plaintiffs' view, what should they have used instead
14 of tear gas?

15 MS. DAHAB: You know, I think there are probably ways
16 for the officers to use nondispersed force. You know,
17 direct -- directly, sort of, cabining the protesters. I don't
18 know that there -- you know, the -- the other uses of force,
19 being munitions that they used here, are certainly not the
20 not-less-lethal.

21 THE COURT: But how do you cabin protesters who are
22 engaging in that kind of conduct? What is plaintiffs' -- I
23 mean, does plaintiff have an alternative to the type of force
24 that you are alleging was unlawful?

25 MS. DAHAB: I mean, at least on the facts alleged in

1 this case, Your Honor, I think -- you know, particularly with
2 respect to many of the plaintiffs who were not violent, many of
3 whom were following dispersal orders -- and I think that was
4 the case for many class members as well -- that no force should
5 have been used, that tear gas was -- was unreasonable because
6 those protesters were not engaging in aggressive acts. They
7 were nonviolently protesting and exercising their right to do
8 that and were lawfully following dispersal orders that the
9 officer had -- that the officers had issued.

10 So our position is, at least as to those individuals,
11 there was no -- there should not have been any use of force.

12 THE COURT: How would they avoid -- again, there are
13 not very many claims in your complaint that say even the
14 plaintiffs were targeted with tear gas. You say some other
15 munitions specifically targeted. But with tear gas, assuming
16 they were bystanders there, do you have -- or officers -- is
17 there any way to avoid tear gas affecting innocent plaintiffs,
18 for example, if they're in the crowd and there are others who
19 it's appropriate to use tear gas? I mean, how do you avoid
20 that?

21 MS. DAHAB: I'm not sure how you avoid it. Frankly,
22 I don't know how you avoid that. I don't want to concede that
23 tear gas would have been a -- particularly in a pandemic, would
24 have been a reasonable use of force under any circumstances
25 here. And there may have been ways to, like I said, handle the

1 protesters, at least the violent protesters, individually,
2 without having to resort to tear gas at all.

3 THE COURT: All right. So I know I'm asking you
4 questions that go beyond really what the purpose of this is,
5 but I don't get to see you very much in the context of a
6 hearing here.

7 MS. DAHAB: Sure.

8 THE COURT: So I think that is something that just I
9 wanted to talk about.

10 MS. DAHAB: No, I appreciate that. I think it's -- I
11 know Your Honor is very cognizant of this, and I just want to
12 make clear, though, that the allegations of the complaint are
13 such that, you know, the class that we're seeking -- or the
14 plaintiffs and the class that we may eventually seek to
15 represent are nonviolent and otherwise peacefully protesting
16 individuals who were following at least the dispersal orders
17 that were issued.

18 As I say that out loud, I'm thinking that there are
19 allegations also as to the -- in this complaint about the
20 office -- the officials' failure to issue dispersal orders, in
21 the first instance, on many of these nights; and that, I think,
22 is one predicate step in response to Your Honor's questions
23 about what -- how officers should have responded even to
24 violent protesters. The first thing that they should have done
25 is issued a dispersal order on many of these nights, and they

1 failed to do that.

2 But I think the allegations of this complaint are
3 different than the circumstances that Your Honor is describing,
4 and these allegations, particularly when you construe them in
5 favor of plaintiffs, are such that I think -- I think this is
6 getting to the qualified immunity question, which you didn't
7 ask me to focus on, but are such that there was an excessive
8 use of force here, that as -- getting us back on track here --
9 that we think squarely falls within the ambit of *Bivens*.

10 I was going through the complaint, and we were looking at
11 paragraph 25 through 30, which described generally the roles of
12 each of these supervisory officers. Some of them were in
13 Washington and some of them were here in Portland, and
14 plaintiffs understand that.

15 If the Court turns, then, to -- I don't want to skip
16 important allegations here -- to paragraph -- and I will say
17 that the -- the complaint refers both to Doe -- John Doe
18 supervisory defendants and John Doe patrol-level defendants, as
19 well as all supervisory defendants. And in plaintiff's view,
20 the allegations referring to all supervisory defendants include
21 the six supervisory defendants that have moved -- that have
22 filed a motion here.

23 So paragraph 4, again, generally --

24 THE COURT: Actually, let me ask you about that,
25 Ms. Dahab. The defendants make the point, and I think it's

1 well taken, that under *Bivens* -- a blanket allegation that
2 doesn't specify individual conduct is insufficient under
3 *Bivens*. Is that wrong?

4 MS. DAHAB: I think it -- I mean, I don't -- by
5 referring to all supervisory defendants, I don't think that's a
6 blanket allegation that doesn't refer to specific conduct. The
7 allegations referring to all supervisory defendants contain, I
8 think, sufficiently specific information about the conduct of
9 those supervisory defendants to satisfy *Bivens*.

10 I think, sure, there's a level of generality that may be
11 insufficient, some of the cases acknowledge, but I don't think
12 we have that here, and I don't think that just simply referring
13 to all supervisory defendants necessarily makes the allegation
14 itself. I don't know that I can specify the standard under
15 *Bivens*.

16 43, I think, starts a series of allegations about all
17 supervisory defendants and the fact that they were acting under
18 color of law, that they are not named herein -- some of them
19 are not named herein, and that all of those agents had
20 oversight or administrative authority or were specifically
21 dispatched to or stationed here in Portland.

22 I'm then going to skip the class action allegations and
23 turn to paragraph 60. My apologies in advance for jumping all
24 over, but I think paragraph 60 is where we start -- start
25 setting forth particular allegations of conduct that both the

1 supervisory defendants and the patrol-level defendants engaged
2 in with respect to use of force against nonviolent or
3 peacefully protesting individuals during -- in the protest
4 zone.

5 Those allegations include, for instance, escalating the
6 violence on a nightly basis; failing to deescalate the
7 strategy -- their tactics -- to mitigate the violence;
8 targeting peacefully and lawfully dispersing individuals;
9 pursuing protesters, observers, and journalists throughout the
10 streets; and also firing some of the munitions that we describe
11 in later paragraphs of the complaint.

12 Paragraph 61 describes that the officers built the fence
13 and fired from the fence and also sometimes from higher floors
14 above the ground level at the courthouse at the direction of
15 the supervisory officers.

16 And then I think the paragraphs from -- from 65 and 66
17 also talk about the specific use of force by those supervisory-
18 and patrol-level defendants.

19 THE COURT: And so which defendants -- so you have
20 five -- six defendants named here. So, for example, you are
21 alleging that by actually building the fence, that subjects
22 them to a *Bivens* personal liability? And which one is
23 responsible for that?

24 MS. DAHAB: No. I'm saying that they built the fence
25 or somebody told them to build the fence and the fact that

1 they're firing munitions from inside the fence and from floors
2 above the ground level, at the direction of the supervisory
3 defendants, is what gives rise to the *Bivens* liability, not the
4 construction of the fence itself.

5 THE COURT: So the fence is not part of -- you're not
6 alleging that the -- what is the purpose of the statement about
7 the fence?

8 MS. DAHAB: I mean, I think the fence is relevant,
9 Your Honor, to the extent that the officers are protected by
10 the fence, and they're -- it put them in a place of safety
11 from -- from otherwise violent protesters that may have been
12 there, but I think that lessened their -- the reasonableness of
13 their use of force against the protesters.

14 THE COURT: Understood. Thank you.

15 MS. DAHAB: And then I'm going to skip to
16 paragraphs 70 through 76, which addressed, specifically,
17 supervisory liability.

18 I think the prior paragraphs obviously provide context for
19 what was happening, who was doing what, and the nature of the
20 force used on the protesters.

21 72 and 73 describe more specifically what these six
22 defendants were doing, which is to say that Defendants Russell,
23 Smith, and Jones were manning the incident command post within
24 the courthouse itself, watching the actions outside on live
25 feed video, while Morgan -- Morgan, Burger, Cuccinelli, and

1 Wolf -- who are no longer part of the case -- otherwise had
2 knowledge, under paragraph 73, that all this was going on on a
3 nightly basis.

4 THE COURT: Although, does that show, again directly,
5 that they would have seen any of the specific targeting that
6 you allege happened to any of these named plaintiffs?

7 MS. DAHAB: We allege in paragraph 76 that the
8 supervisory defendants knew of, either in real time or within a
9 day of it happening, every single one of these incidents
10 between (a) and just to (ff) of the complaint. I don't know
11 that we allege that they saw it -- each one of those happening.

12 The people that were inside the Hatfield Courthouse,
13 watching on a live feed video, very well could have. I don't
14 think we have enough information, and we hope to get that sort
15 of information in discovery in this case. We don't have that
16 specific level of information, but we allege that they knew
17 that the -- all of those incidents happened either at the time
18 that they happened or shortly thereafter.

19 THE COURT: And what do you allege that shows they
20 participated in it? Which aspect of the complaint shows that?

21 MS. DAHAB: I think these paragraphs show
22 participation. I think under a standard set forth in *Starr v.*
23 *Baca* and in *Chavez v. United States*, we have to allege either
24 direct participation or information sufficient for these
25 supervisory-level -- supervisory-level officers to know what

1 was happening and not do anything about it.

2 So I don't think the standard requires us to allege that
3 they were shooting munitions themselves but that they had
4 enough information to know that that was happening and didn't
5 take affirmative steps to stop the -- the constitutional
6 violations that were occurring.

7 THE COURT: Okay.

8 MS. DAHAB: In plaintiffs' view, these allegations,
9 in particular 73 to 76, are where we meet that standard.

10 All of this -- all of those allegations, Your Honor, are
11 very much focused on the use of force by the officers on the
12 ground against the protesters. They do not seek to challenge
13 the executive order that led to the -- that led to the
14 stationing of those officers in Portland to protect the
15 Hatfield Courthouse.

16 I think that is a -- we tried to make that more clear in
17 our briefing on this -- on the second round. I think it -- in
18 many ways that distinguishes these six officers whose motion
19 currently is before the Court from Defendants Wolf and
20 Cuccinelli, who truly are -- who were -- I don't want to
21 concede anything as to Wolf and Cuccinelli, but they were, you
22 know, political appointees who were high -- who were at the
23 highest level making the policy decisions and implementing the
24 policies at the direction of the President.

25 These officers, I think, are differently situated, in the

1 sense that they are not -- not making the policy decisions. We
2 are not challenging those policy decisions. They are on the
3 ground, watching excessive uses of force occur as they occur
4 and not taking steps to prevent it, and I don't think anybody
5 argues here that those uses of force were contemplated by the
6 policy that they were -- that were -- that they were stationed
7 to carry out.

8 All of that, I think, squarely puts this case in the
9 context of *Bivens* and doesn't require an expansion of *Bivens*
10 for this Court to allow this cause of action against the
11 officers.

12 *Abbasi* makes clear, I think, that that case -- you know,
13 the defendants' motion cites a lot of statements from *Abbasi*
14 that casts doubt on the validity of *Bivens*. *Abbasi* makes very
15 clear that it was not intended to do that and that *Bivens*, as a
16 fixed principle of law and a principle on which litigants have
17 relied for decades, still exists.

18 I don't think this is a new context because we have --
19 again, as I have just described, we have those specific uses of
20 force. We have the Fourth Amendment context in which *Bivens*
21 arose and federal officers engaging in excessive uses of
22 forces -- force or unlawful searches and seizures against
23 individuals.

24 I think *Abbasi* itself contemplates that the fact that
25 these are supervisory-level officers, as opposed to

1 patrol-level officers, does not make this a new context. One
2 of the factors that goes to whether a context is new, as the
3 Court knows, is whether we're dealing with a new category of
4 defendants.

5 And the Court has acknowledged that claims, for example,
6 against federal agencies or claims against private prison
7 officials or claims against private individuals are all new
8 categories of defendants that require -- otherwise require an
9 expansion of *Bivens*. This is not that. These are claims
10 against individuals for Fourth Amendment violations that they
11 were involved in and directly involved in for 30 days in a row
12 in July of 2020. It is -- it is very much precisely within the
13 framework of what *Bivens*, I think, recognizes.

14 And I say that *Abbası* contemplates this because there was
15 one claim in *Abbası* that the Supreme Court remanded for
16 analysis of special factors, and that was the claim against the
17 warden, and it -- in *Bivens* itself -- you know, *Bivens* -- I'm
18 sorry -- in *Abbası* itself, the Supreme Court says, yes, this is
19 a new context because it's a different constitutional right at
20 issue.

21 It says, you know, the supervisory liability case law in
22 the Eighth, Fifteenth -- Eighth, Fifth Amendment prison context
23 isn't as clear, but it doesn't say that the fact that a warden
24 is a supervisor necessarily makes that a new context.

25 Here, by contrast, we -- the fact that these are

1 supervisors, as contemplated in *Abbas*, does not make it a new
2 context, and we have plenty of precedent, I think, that
3 established the standard for how these supervisory-level
4 officers should have -- or what they should have done or what
5 makes them liable under the Fourth Amendment, when they do --
6 when they act in the manner that is alleged here, when they
7 watched the constitutional violations happen.

8 THE COURT: Are you alleging that all use of tear gas
9 during the period July 1 to July 20 was unlawful?

10 MS. DAHAB: We're alleging that the indiscriminate
11 use of tear gas was unlawful, to the extent that it was used
12 indiscriminately against crowds that were not violent.

13 THE COURT: So does that mean all use would be
14 unlawful because -- I think it's common knowledge that there
15 were peaceful protesters and then not-so-peaceful protesters
16 so -- and tear gas spread; so is all of it unlawful, in your
17 view -- is that part of your claim? -- and that's what the
18 supervisors knew?

19 MS. DAHAB: To the extent that the -- I mean, our
20 position is that the --

21 THE COURT: I guess maybe the question is what does
22 "indiscriminate" mean?

23 MS. DAHAB: Sure. When you -- I guess, when the
24 officers used tear gas as use of force, and in Your Honor's
25 example, tear gas, against crowds of individuals, some of whom

1 are nonviolent, some of whom are dispersing pursuant to a
2 dispersal order and are otherwise -- and against whom even the
3 use of tear gas would be unlawful or unreasonable, that's
4 indiscriminate. Right? The officers have to act in a
5 particular -- particularized way, and they have to do so with a
6 warning to protesters.

7 So I think that the use of tear gas here, without a
8 warning to all protesters no matter how they were acting, was
9 unlawful.

10 THE COURT: Okay. Go ahead. I interrupted you. Go
11 ahead.

12 MS. DAHAB: No, it's okay.

13 I was talking about *Abbasi*. I think that the upshot of
14 what I was trying to say is that the fact that these were
15 supervisors does not make this a new *Bivens* context. And that,
16 I think, is directly contemplated by the fact that the Supreme
17 Court did not shut down the supervisory liability claim against
18 the warden in *Abbasi* itself.

19 All of the other -- I don't want to repeat all the factors
20 for the Court that we, I think, sufficiently set forth in our
21 briefing; but in our view, these officers are not so high level
22 as, perhaps, Wolf and Cuccinelli were, such that they would --
23 they would categorically become a new context, and they were on
24 the ground. Many of them were in the courthouse. Many of them
25 were watching on a live feed video day in and day out for 30

1 days as these constitutional violations happened.

2 The fact that -- again, the fact that they're supervisors
3 doesn't make this automatically a new context. And in
4 plaintiffs' view, none of the other factors that the Supreme
5 Court has articulated that might otherwise give rise to a new
6 context under *Bivens*, does not do so here.

7 I don't know if it -- I want to be as helpful for the
8 Court as possible and, like I said, not repeat our briefs, but
9 the special factors analysis, I think, you know, even if the
10 Court were to find that this would be a new context under
11 *Bivens*, if it -- if it is not a new context, obviously the
12 inquiry stops there. If you were to find that it is, we also
13 don't think that special factors counsel against the
14 expansion -- you know, we're not challenging, as we have -- as
15 I have described, we're not challenging high-level policy
16 decisions here. We're challenging the direct participation of
17 the supervisory officers as they watched the constitutional
18 violations occur every day in July.

19 THE COURT: Aren't you challenging the use of tear
20 gas to disperse crowds -- a policy?

21 MS. DAHAB: Well, that -- that was -- we are
22 challenging the officers' decisions here to use excessive force
23 against protesters. Some of that was a policy decision that
24 was made. We are not challenging that policy decision. We're
25 challenging the decisions that the officers made on the ground

1 and the force that they used in particular cases against
2 individuals.

3 THE COURT: All right.

4 MS. DAHAB: So I want to make that very clear. If
5 there were policies in place here, we do not challenge those
6 policies. We're not challenging executive order or any
7 other -- or any of the other policies that may have existed to
8 implement the executive order. I don't know if we know what
9 those are because we haven't gotten discovery yet, but we are
10 challenging the individual decision that the officers made on
11 the ground to control, for crowd control purposes, on the
12 nights in question.

13 THE COURT: Okay.

14 MS. DAHAB: Okay. The other special factors, in our
15 view, don't -- again, don't counsel hesitation toward
16 expansion. If the Court finds this is a new context, there
17 really is no other remedy here. Our injunctive relief has
18 already been dismissed. I don't think there's an APA claim,
19 although the defendants seem to bring that up several times,
20 and the FTCA the Court has already -- the Supreme Court has
21 already held that is not a factor that counsels against
22 expansion.

23 All the workability concerns about this being a class
24 action or these being motive-based claims, which they are not,
25 are also not relevant factors.

1 I think, at bottom, these are Fourth Amendment claims, and
2 the Supreme Court has already contemplated that even in the
3 supervisory capacity they're still Fourth Amendment claims that
4 can fall within the original context that *Bivens* existed to
5 provide.

6 I will stop there and not address qualified immunity
7 unless this Court has particular questions on that piece.

8 THE COURT: No, I don't.

9 Let me just ask: Would you have an APA claim if your
10 challenge was to the policy of using tear gas?

11 MS. DAHAB: If there was a policy in place, that
12 would -- I suppose a policy would be a final agency action. So
13 there may be an APA claim against a policy. We are not
14 challenging any policy in that regard.

15 THE COURT: Understood. Thank you, Ms. Dahab.

16 Why don't I hear from Mr. Greene.

17 MR. GREENE: Thank you, Your Honor. I'll do my best
18 to not repeat the -- what we have argued or repeat much; so I
19 guess I should lead -- I'm assuming the Court can hear me?

20 THE COURT: Yes, I can hear you.

21 MR. GREENE: I'll just lead with our -- the
22 inclination of our clients -- Defendants Burger, Cline, Jones,
23 Morgan, Russell, and Smith -- is that the Court is correct to
24 be inclined to dismiss the claims against them because we
25 believe that in the same -- for the same reasons that the Court

1 found there was a new context with respect to the claims
2 against Defendants Wolf and Cuccinelli, we believe the new
3 context that's presented here is the exact same context, and we
4 believe that the same reasons that the Court found to counsel
5 against a remedy are applicable here.

6 We noted five reasons why a new context is presented.
7 There were two that the Court cited in Clark: The rank of the
8 defendants and the specificity of the alleged conduct. Counsel
9 noted that they alleged the identities and roles with respect
10 to what happened or with respect to Operation Diligent Valor in
11 that the response to crowds had to be individualized, but the
12 Supreme Court has recognized that legal allegations and
13 liability must also be individualized, and that is not present
14 in this complaint.

15 The Court has already, in the claims against
16 Defendants Wolf and Cuccinelli, declined to attribute the
17 multitude of allegations that cite defendants generally, and
18 supervisory defendants declined to attribute those to Wolf or
19 Cuccinelli, and those should not be attributed to these
20 defendants.

21 And when those allegations are removed, what you have are,
22 by my count, four allegations that name any of these defendants
23 specifically. Defendants Burger and Cline -- there's nothing
24 alleged beyond the titles that they held and the
25 responsibilities of their former government positions, and

1 there's an allegation that Defendant Cline stood next to
2 Chad Wolf at a press conference. There's an allegation with
3 respect to Defendant Morgan that he made statements about
4 officers lead in Portland, which isn't really a constitutional
5 violation, as far as I can tell.

6 And what is left are allegations -- an allegation
7 involving Defendants Russell, Smith, and Jones about their
8 presence at an incident command post, but there's no allegation
9 that they observed any particular misconduct directed at any of
10 the specific plaintiffs. And in that regard, I think reliance
11 upon cases like *Chavez* or cases -- or a case like *Chavez* or
12 *Starr* is misplaced.

13 In *Chavez* the Court -- which was a *Bivens* case -- the
14 Court addressed supervisory liability or alleged -- attempted
15 to hold supervisors liable for unconstitutional traffic
16 stops -- allegedly unconstitutional immigration traffic --
17 immigration-related traffic stops, and the Court specifically
18 found that the only supervisor that could be held liable, where
19 an allegation was sufficient to potentially hold them liable,
20 was a supervisor who was alleged to have actually stopped
21 traffic. He actually stopped cars. He wasn't -- the Court
22 found that an allegation that was based -- that tried to hold
23 the commissioner of the agency liable based on his title, that
24 that wasn't sufficient. I know it wasn't sufficient to allege
25 that someone was liable because they had authority over

1 operations, and it wasn't sufficient to hold someone liable
2 because they had received complaints about unlawful conduct.

3 The only -- the only supervisor held liable was someone
4 who actually participated in the conduct directed at a specific
5 plaintiff, and those allegations are not present here,
6 Your Honor.

7 In terms of the knowledge and acquiescence, there are no
8 *Bivens* cases that had -- that a Supreme Court in these cases,
9 in which knowledge and acquiescence, has been sufficient,
10 certainly not in the Fourth Amendment context to hold
11 liability.

12 In *Carlson* the Court found awareness of a medical
13 condition, coupled with the fact that the person was in custody
14 and there was a duty to -- there was a duty to address that
15 medical condition, that specifically found liability. But just
16 general knowledge of wrongdoing being done by others or
17 subordinates was not sufficient to establish liability.

18 In terms of the argument that these -- these defendants
19 are in a different situation or different place, in terms of
20 the policy allegations, that's not really -- that's
21 contradicted by the nature of the allegations in plaintiffs'
22 complaint.

23 In plaintiffs' complaint, they specifically say that --
24 they admit the policy-based nature of their -- of their -- of
25 *Bivens* claims. In paragraph 134 they allege that the

1 supervisory defendants -- the quote/unquote "supervisory
2 defendants" -- adopted and implemented a policy -- adopted and
3 implemented a policy of deploying excessive force against
4 everyone that protested in the vicinity of the Hatfield -- of
5 the Hatfield Courthouse, and they further say that their
6 injuries were the moving force. I'm sorry. They say that the
7 moving force behind their injuries was this policy. So they're
8 admitting the policy-based nature of their claims and tying
9 that to -- tying the policy -- a policy or multiple policies to
10 their -- to their injuries.

11 The claim that they're not --

12 THE COURT: Mr. Greene, which paragraph of the
13 complaint is that? Can you remind me?

14 MR. GREENE: That was paragraph 134.

15 THE COURT: Okay. Thank you.

16 MR. GREENE: Yes. And the next paragraph, in
17 paragraph 135, they state that their -- that these -- this
18 policy was the moving force behind their alleged injuries.

19 Moreover, the claim that they're not challenging policy is
20 contradicted by the nature of their allegations. As I noted
21 and as we say in our complaint, Your Honor -- I'm sorry -- in
22 our motion, the entire complaint -- the second amended
23 complaint contains a handful of allegations that directly
24 identify any of these six defendants. The claims are premised
25 upon these defendants' alleged knowledge and direction of

1 unlawful detentions or excessive force by line-level officers
2 against a subset of protestors that happen to include
3 plaintiffs.

4 They are challenging decisions that were made with respect
5 to these officials that purportedly led to the collective
6 mistreatment of a group of people. And those are, by
7 definition, claims that challenge the application of a general
8 policy that affected plaintiffs and others in similar -- that
9 affected plaintiffs and others in similar ways.

10 That's in contrast to the claims that the Ninth Circuit
11 recognized in *Reid* as being *Bivens* claims or what *Bivens* claims
12 are typically -- to address, which are claims against
13 rank-and-file federal officers for an officer's individualized
14 mistreatment of a specific plaintiff.

15 In terms of the -- and, moreover, with respect to the new
16 context inquiry, I think it's -- in a recent Ninth Circuit
17 en banc opinion -- *Boule* -- the Ninth Circuit found that even
18 that case, which involved -- involves -- *Boule* is actually
19 before the Supreme Court now, but the en banc panel of the
20 Ninth Circuit found that a claim in which an individual alleged
21 that he was assaulted by a federal officer on his own property,
22 that that Fourth Amendment claim was a modest extension of
23 *Bivens* because it involved a CBP officer as opposed to an FBI
24 agent.

25 So I don't -- I think that based on even Ninth Circuit

1 case law, it's difficult to make the argument that claims that
2 are challenging, things that happened allegedly over a 30-day
3 period of time, involving a multitude of defendants and actions
4 by line-level officers that were supposedly observed or
5 directed or had knowledge of by the supervisors, that that's
6 not a new context. I think that is a difficult argument to
7 make in light of even Ninth Circuit case law, let alone Supreme
8 Court case law.

9 In terms of the -- the rank of the defendants, it's -- the
10 specific levels, the ranks of the defendants, these positions,
11 don't really matter. What matters is that they're not
12 line-level officers being sued for their specific conduct being
13 directed towards a specific plaintiff, that therefore they're
14 being sued under a theory of supervisory liability and the
15 direct participation arguments are conclusory and are not
16 sufficient to state a claim against these defendants.

17 So, again, I don't want to repeat our filings too much,
18 Your Honor. If the Court has other questions, I'm happy to
19 address them.

20 THE COURT: All right. No. I think I'm satisfied.

21 All right. So I'm going to take this under advisement. I
22 should have a decision out quickly, but I want to think about
23 your arguments and look at some of the cases again that you
24 just mentioned.

25 So that's my current status of that motion.

1 Then let's turn to the motion to compel discovery.

2 It seems like the government has provided a number of
3 incident reports that they complied with. I believe they have
4 complied with the order that I previously issued when we had
5 our last hearing just about identities of officers who were
6 involved during the period of time alleged in the complaint
7 involved in use-of-force incidents. At that time there wasn't
8 a request for specific incident reports, but I understand
9 that -- or there may have been a request. I didn't order that,
10 but I know the government has provided some of those incident
11 reports.

12 MS. DAHAB: No. Now, we've -- well, we have received
13 from the government a list of names only. They have not
14 produced any incident reports to us.

15 THE COURT: All right. So you can advise me -- I'll
16 hear probably, Ms. Dahab, what you have and haven't had and
17 what you're looking for. Let me tell you what my inclination
18 is and then you can tell me if I'm right or wrong.

19 Again, while I'm deciding the supervisory agent motion to
20 dismiss, I don't believe at this stage you're entitled to a
21 30(b) (6) deposition. So my inclination is that I would -- I
22 don't know if it's in the status of asking for an order about
23 that, but I would not compel those depositions is my
24 inclination.

25 My inclination is that you're entitled only to incident

1 reports regarding the specific incidents not involving tear
2 gas, but the other munitions that are alleged in the complaint
3 with regard to your named plaintiffs, and -- rather than every
4 night of tear gas because at this point it's not clear to me
5 that the tear gas class survives under *Bivens*. So I'm going to
6 give you limited discovery.

7 Again, I haven't -- that issue hasn't been teed up for me,
8 but I think it's within my discretion and appropriate for you
9 to try to determine not just the identity of officers who were
10 on but officers that were on for that specific -- incident
11 reports related to the specific time period of the specific
12 plaintiff with the allegation that is in the complaint.

13 So, for example, Plaintiff Maher states that on July 22nd,
14 between approximately 12:30 and 1:00 a.m., a federal agent
15 wearing camouflage -- he beat her with a baton when she was
16 walking away. I would -- my inclination is you get that
17 incident report or incident reports that could be -- or from
18 that time period regarding use of force.

19 And, similarly, there's another one from 2:00 to 3:00 a.m.
20 Struck in the head by a munition.

21 So it has to be very specific. Again, I'm just telling
22 you my inclination, and I'll hear from you both, but very
23 specific -- only with regard to the specific allegations.
24 Again, that's where the individual complained -- plaintiffs say
25 they were targeted specifically. Not the broad "I took in tear

1 gas that was being sprayed." That's why -- that's too broad at
2 this stage, but -- so at this stage I'll allow just the
3 specific incidents that are given up with non-tear gas, unless
4 there was "tear gas sprayed in my face purposely on a
5 particular date and time," which I don't think that is in the
6 complaint; but if it is, it's specific targeting.

7 So, first, let me ask Mr. Clendenen. Is what I have
8 just -- again, I'm just saying it's my inclination. I'll let
9 you argue, but would that be a clear order from me that the
10 government could comply with?

11 MR. CLENDENEN: Your Honor, I think it's clear
12 enough. I think so. I'm hesitant just to say it's definitely
13 because we don't -- I haven't discussed with agencies whether
14 or not there's an easy way to, you know, cleave off the tear
15 gas use versus other uses of force. It should be. The
16 use-of-force reports, I believe, should indicate what sorts of
17 munitions were used, at least in most cases; but I think it's
18 at least possible to comply with that.

19 THE COURT: And let me say the underpinning of my
20 inclination is, I think, plaintiffs should be able to get --
21 it's insufficient simply to -- and I realize that, really,
22 probably my giving plaintiffs just the identity of all officers
23 previously doesn't really get to the identity of the officer
24 involved in the alleged behavior, and there -- it seems to me
25 that the only specific alleged behavior that one could

1 accomplish getting to the identity of that officer and then,
2 obviously, you know, it gets litigated on whether there was a
3 motion to dismiss or -- but at least to identify the officer
4 involved in the incident regarding Plaintiff Maher, for
5 example, is to look at incident reports regarding use of force
6 that -- regarding batons, you know, regarding the specifics of
7 what that plaintiff alleges at the time period and place that
8 plaintiff alleges it. And if it's not sufficiently specific,
9 they don't get it.

10 But I think they're entitled and it's within the Court's
11 discretion to afford them that limited discovery because
12 identity of officers generally is not helpful. What they need
13 is officers engaged in the specific conduct that they have
14 alleged is violative of their rights.

15 MR. CLENDENEN: That's understood, Your Honor. Yes.

16 THE COURT: So I haven't walked through those
17 specifics. And my order, I think, is going to be broader than
18 that; but, if necessary -- I don't think it should be disputed.
19 Either they gave enough specificity that it is -- you know,
20 general time, date -- not the whole summer, but general time,
21 date, and what happened, that the government could match up
22 reports that would potentially get, from that specific
23 information, incident reports that -- again, I'm not saying
24 they can't be redacted if there is information that should not
25 be conveyed, but they're -- I think they're deserving to get

1 the identity of the officer involved in the incident that
2 they're complaining happened, and I don't know how else to
3 accomplish that and move this case forward without that
4 information.

5 So why don't I hear first -- but I just wanted to make
6 sure that was clear, Mr. Clendenen, before I hear from
7 Ms. Dahab why she should get the rest of the information that
8 they seek.

9 MS. DAHAB: Thank you, Your Honor.

10 I think that what you have just articulated is certainly
11 within the scope of information that we seek, and I think in
12 our motion we tried to ask for the names of particular officers
13 and the method of force used at specific locations against the
14 plaintiff. So I think that is consistent, at least in part
15 with what we -- what we ask for. I want to make clear -- and
16 maybe I made this -- we talked about this a little bit in the
17 argument on the motion to dismiss. I apologize if I'm
18 restating our position on this. I just want to make sure that
19 I've stated clearly our position on this tear gas issue and
20 what conduct by the federal officers, in plaintiffs' view, is
21 violative of their rights with respect to tear gas.

22 It's plaintiffs' position that if there's a nonviolent
23 protester in a crowd or if there's nonviolent protesters in a
24 crowd of violent protesters, that use of tear gas against all
25 the protestors violates the rights -- is an excessive use of

1 force because the use of tear gas, just like the use of the
2 other munitions that we describe in the complaint, has to be
3 individualized. It has to be specifically, you know, targeted
4 based on the conduct of the person being targeted.

5 So I think that's consistent with the case law. I just
6 want to make that very clear, to the extent that I didn't
7 before.

8 Just, obviously, in our view, the use of tear gas against
9 these plaintiffs, as well, violated the Constitution, and so we
10 should be entitled to those -- to those reports as well and the
11 information pertaining to the identity of the officer and the
12 location of the use as to our particular plaintiffs.

13 So that is the basis of our request on that -- on that
14 issue.

15 THE COURT: And the reason I'm not -- I understand
16 that's a basis of your claim; and, again, I see the tear gas
17 class as quite different from the -- what you call, I think,
18 the shooting class.

19 MS. DAHAB: Uh-huh.

20 THE COURT: I think those are quite different.

21 And, again, we're not here to litigate that issue now.

22 MS. DAHAB: Right.

23 THE COURT: But it seems to me at this stage, before
24 anyone has been served, when you're not entitled and officers
25 haven't been able to challenge either -- move to dismiss on any

1 basis, including qualified immunity, that it is overly
2 burdensome to request incident reports involving tear gas,
3 which appears to have been used every night.

4 So that means an incident -- and I don't know. I'm not
5 sure what the practice is of the agencies or multiple agencies
6 involved in tear gas or not. I'm just not familiar with the
7 policy. But it seemed to me that that is too much of a burden
8 at this stage in the proceedings, and so I'm trying to limit, I
9 think, something that is your -- you should be entitled to the
10 specific instances.

11 So that's why I have at this stage -- and I'm not saying
12 you would never get it. I'm just -- at this stage, I think
13 this will get the case moving, hopefully.

14 Ms. Dahab, go ahead.

15 MS. DAHAB: Well, I don't mean to interrupt
16 Your Honor.

17 I want to, I guess -- I guess, make -- I guess, flag two
18 things. The first is that I don't think the government is
19 arguing that the provision of the tear gas information is
20 unduly burdensome. I certainly understand they're arguing that
21 depositions would be such, and I understand -- you know, I
22 understand Your Honor's decision on that piece. If the tear
23 gas information is part of the incident report, it strikes me
24 that it may not be unduly burdensome for them to produce that
25 information and may be more burdensome for them to redact it.

1 THE COURT: Understood. And I'm not saying to
2 exclude tear gas. I'm just trying to home in on the specific
3 incidents that you've alleged.

4 MS. DAHAB: Yeah. Yeah. Sure. Okay.

5 THE COURT: I think the allegation regarding
6 indiscriminate use of tear gas is quite broad at this stage; so
7 I'm trying to balance the competing interests of what is
8 appropriate to ask the government to produce at this stage when
9 people haven't been served yet. We're just -- you're just
10 trying -- and your claim was --

11 MS. DAHAB: Sure.

12 THE COURT: You just wanted to identify the officers,
13 and now you have all the names of officers who were involved in
14 the incidents, but you don't have it narrowed down for the
15 specific claims involving your named plaintiffs.

16 So that's what I'm trying to help move forward.

17 MS. DAHAB: Sure. Yeah. And we appreciate that.
18 We, likewise, would like this to move forward. So I think this
19 information will help.

20 The other thing that will help and the other thing we have
21 asked for in the motion to compel is service addresses for
22 these individuals, which we also don't have. And service, as
23 Your Honor knows in this case, has been very difficult,
24 primarily because we're dealing with agencies that are not
25 fully operational because it's a -- because of the pandemic,

1 and so we aren't able to complete service inside buildings.

2 I think the Department of Justice has made clear that, at
3 least in this circumstance, that they're not -- they have not
4 been able to accept service. I don't know if that has changed,
5 but if it has not changed, we would also ask the Court to
6 order -- to order the government to provide service addresses
7 so that we can continue to move this forward.

8 THE COURT: All right. So let me -- Mr. Clendenen,
9 so assuming that that is -- the order I issue is as I
10 described, what -- how do you -- first of all, would the
11 government be -- is there any objection to providing service
12 addresses or accepting service, to the extent officers can be
13 identified that are consistent with the allegations that
14 plaintiff -- named plaintiffs are making in the complaint?

15 MR. CLENDENEN: So, Your Honor, to start with,
16 accepting service -- the Department of Justice itself, like
17 myself, we can't accept service on behalf of individual
18 defendants. In some instances, including, I believe, for some
19 of the defendants who are in this case, there are attorneys who
20 are assigned to represent individual defendants, such as
21 Mr. Greene, and they can, if authorized by their client, accept
22 service on behalf of those defendants. That would be the only
23 instance in which the DOJ could accept service, and that could
24 happen here.

25 I think to the more general point about whether we object

1 to turn over service addresses, we would object -- it doesn't
2 seem appropriate before the defendants have even been named.
3 It seems as though the more appropriate sequence of events
4 would be for the plaintiff to name the defendants in the
5 complaint. Potentially, they'll have a representative assigned
6 to them quite quickly, and the representative can accept
7 process, or maybe the plaintiff can serve them in some other
8 way. And if after a certain period of time they have exhausted
9 all -- all means, then they can make a motion for service
10 addresses.

11 But the point of the early discovery is just to identify
12 the defendants. So the service addresses is a whole separate
13 issue that doesn't need to happen at this point.

14 THE COURT: Ms. Dahab?

15 MS. DAHAB: I think -- I'm worried that we're
16 speaking past each other. We have named several -- we have
17 named many of these supervisory- and patrol-level officers
18 under pseudonyms, at the Court's direction, but have been
19 unable to serve them because -- for the reasons I have
20 described before.

21 So those are also the service addresses that we're looking
22 for because we have not yet been able to complete service on
23 those individuals.

24 MR. CLENDENEN: Your Honor, I didn't quite understand
25 plaintiffs to be seeking the service addresses of the

1 already-named defendants. I thought they were asking for
2 service addresses just with regards to the -- you know, the new
3 identities that would come through the follow-on discovery.

4 With regards to the already-named defendants, I would say
5 that the plaintiffs should submit a separate motion and explain
6 what efforts they have made to serve those defendants already,
7 and in that they can ask for service addresses, and then we can
8 respond appropriately.

9 THE COURT: All right. And I assume, Ms. Dahab,
10 you're referring to the FPS supervisory officers numbers 2, 6,
11 8, 14, et cetera? Is that what you're referring to?

12 MS. DAHAB: All of those, yes. Yes. There's many of
13 them.

14 THE COURT: And then some by initials and then others
15 by number. Okay.

16 MS. DAHAB: And, I mean, we can certainly prepare a
17 separate motion, Your Honor. I think the service issue is
18 really the main thing that is slowing this case down, and so to
19 the extent that we're seeking to move it forward, you know,
20 I -- if the Court would be willing to construe this motion to
21 also encompass -- that's certainly what it was intended to
22 encompass -- those service addresses as well -- because of the
23 reasons that we have articulated in several prior motions of
24 our difficulties in completing service on these defendants.

25 THE COURT: All right. Let me ask, Mr. Clendenen --

1 why don't I have you all confer on -- it sounds like you're not
2 disputing that at some point, after sufficient effort on
3 plaintiffs' part, they could be entitled to get the service
4 addresses. Why don't you confer and find out what steps
5 plaintiffs have taken with regard to the named officers.

6 I think your point is well taken on you having to -- the
7 Doe defendants are not yet named and -- or at least the ones --
8 I'm sorry -- the supervisory- and patrol-level defendants
9 1 through 140 are not named. So your point is, I think,
10 correct that, you know, they need to be named first. And,
11 again, I'm still having, at this stage of the proceeding, based
12 on our -- I think it was our very first hearing -- that they
13 would be identified by number or some other pseudonym rather
14 than actually having their names on the complaint because it
15 was established that there was a security risk.

16 So it would be helpful, if it hadn't happened, that you
17 have a conferral with Ms. Dahab and see if there's some way to
18 more easily effect service. I don't want to have them
19 identified by name. And that does pose, I would assume,
20 additional challenges for plaintiffs with regard to service. I
21 mean, if it doesn't, then I'm wrong on that, but if -- I'm
22 trying to both protect the officers' identities, at this stage,
23 until we know that they are viable participants in this lawsuit
24 and -- but also speed things up.

25 So I'm not going to order right now that the government

1 provide the service addresses, but that is something I would be
2 inclined to do if a lot of effort has been made by the
3 plaintiffs. So knowing that, hopefully you can confer and come
4 to an agreement without having to come back to me for that, or
5 get permission to accept service. However they would prefer to
6 do it.

7 So the only order I'm making is conferral on the issue of
8 providing service addresses for the named individuals in the
9 complaint -- in the second amended complaint.

10 All right. Any other questions, Ms. Dahab?

11 MS. DAHAB: I don't think so, Your Honor.

12 THE COURT: Mr. Clendenen, any additional issues with
13 regard to the discovery?

14 MR. CLENDENEN: No, Your Honor.

15 THE COURT: All right. So I'll stick with, then, my
16 inclination. My order is that the government should provide
17 incident reports that are directly tied to the specific
18 incidents alleged only by the named plaintiffs with regard to
19 instances where they were -- they allege they were specifically
20 targeted. So there's some where the named plaintiffs -- again
21 I'm going back to tear gas -- they were affected by tear gas,
22 but it doesn't allege that they were specifically targeted, and
23 so I'm not requiring those to be turned over. Just where they
24 allege they were specifically targeted at a certain time and
25 place and that -- for the most part, those appear to be

1 non-tear-gas incidents, based on my memory of the complaint.

2 All right. So let's -- maybe we've talked, actually,
3 about the status of the case now with regard to these other
4 parties.

5 What is the status of serving any of these others,
6 Ms. Dahab? Has anybody else been formally served?

7 MS. DAHAB: I should have pulled this before I came
8 into this hearing. I apologize that I didn't. I think that we
9 have had -- we named one other person by name, and I think we
10 were able to complete service on Leonard Eric Patterson.

11 The other -- the other pseudonymed defendants we have not,
12 to my knowledge. I need to double-check. We have sent process
13 servers out several times but have not been able to complete
14 service on them.

15 THE COURT: And then with regard -- I note that you
16 had -- who -- so Leonard Eric Patterson is -- what role is that
17 person?

18 MS. DAHAB: This is in paragraph 31 of our complaint.
19 Director of the Federal Protective Service.

20 THE COURT: Okay. And I note Donald Washington was
21 head of the U.S. Marshals Service.

22 So you're still --

23 MS. DAHAB: I'm sorry. I think the folks that we
24 have identified by name we were able to complete service on
25 them. I -- with the -- with one -- I think there was one

1 exception. I apologize I don't have all the detailed
2 information for the Court this morning.

3 Most of the pseudonymed defendants we have not, but a few
4 of the named ones we have.

5 THE COURT: All right. Mr. Greene, do you know if
6 those -- is DOJ representing some of those supervised -- they
7 were high-level supervisory personnel that ran the agencies.
8 Is that -- have they answered, or do you -- anything you can
9 tell me about the status?

10 MR. GREENE: At this point, Your Honor, we -- I am
11 only representing the defendants that we filed motions on
12 behalf of. I don't represent anyone other than the folks
13 that -- the six defendants before the Court today and
14 Defendants Cuccinelli and Wolf.

15 THE COURT: Okay.

16 MR. GREENE: I believe that other defendants have
17 submitted requests for representation, and they may still be
18 being processed.

19 THE COURT: All right. Okay. Thank you.

20 All right. Is there anything else, from plaintiffs'
21 perspective, that you think I need to take up today?

22 MS. DAHAB: I don't think so, Your Honor. We
23 submitted -- we had a Rule 26 conference with Mr. Greene and
24 submitted a report. So I think the discovery that we seek
25 there really -- I think that the dispute there centers on the

1 resolution of the motion to dismiss that we just argued and any
2 discovery we might get in the meantime; but other than that, I
3 can't think of anything else.

4 THE COURT: All right. I'll ask you the same
5 question, Mr. Greene and Mr. Clendenen. I did have a question,
6 because I know that there are a number of other cases,
7 including ones assigned to me, that are very similar and even
8 some -- I note there are cases or paragraphs in this complaint
9 that are actually cases that -- those people brought their own
10 cases independently; so I assume they are not members of the
11 class here, such as Mr. LaBella. I know another judge has that
12 case. I have the Protest Medic cases and a lot of them are
13 named here, but it seemed to me -- and I'm just trying to find
14 the cases -- whether there is -- somehow whether it makes
15 sense -- and, obviously, I don't have all of those. There's
16 not necessarily complete overlap, but I think there's a large
17 overlap of the lawyers. Ms. Dahab and I -- let's see. I
18 have -- Kristiansen, Cohen, Mead, Haberman-Ducey,
19 Jessie-Uyanik, and Ketcher are all excessive force cases. Is
20 there -- I want to make sure we're really using judicial
21 resources efficiently here.

22 MS. DAHAB: Sure.

23 THE COURT: And is there -- and not repeating the
24 same motions in every case, and it looks like the defendants
25 are largely the same. Is there -- have you talked about --

1 with the government about whether there's a way at least to
2 consolidate, for purposes of discovery or motions, so that we
3 don't waste everybody's time?

4 MS. DAHAB: Sure. I think, with the Court's
5 permission, I'm inclined to defer to Mr. Park or Ms. Burrows on
6 this. I'm not -- I'm not counsel of record on those Individual
7 cases. I know they have had conversations with the government
8 about potentially consolidating some of those cases.

9 And we, of course, would be fine with consolidating for
10 the purposes of discovery with the class case.

11 THE COURT: Mr. Park or Ms. Burrows, any input you
12 want to give on that?

13 MR. PARK: Dave Park, Your Honor. The individual
14 cases have been consolidated for purposes of motions to
15 dismiss. The individual cases should not be -- well, they
16 might have certain common aspects of discovery, but each are
17 discrete, separate incidents on separate dates, involving
18 different officers, different people, different supervisors.
19 It would make no sense to really consolidate those for
20 discovery.

21 THE COURT: So in those cases you are not going to be
22 seeking the broader information about the -- everything going
23 on during the time period?

24 MR. PARK: Those cases are specific serious injury
25 cases, Your Honor. We're focusing on the officers that are

1 directly involved in inflicting the harm.

2 THE COURT: All right. Understood.

3 What about -- Mr. Greene, I don't know if this -- are you
4 on each of these cases also?

5 MR. GREENE: Yes, Your Honor. As it so happens, I am
6 on those cases. Those cases involve the same six defendants
7 who are on the motion to dismiss here, and the Department is
8 representing everyone except for Mr. Smith, I believe, who I
9 believe is represented by private counsel. There's one
10 defendant who is represented by private counsel.

11 But we had filed a motion to dismiss on behalf of the
12 defendants we represent, and the other defendant, I believe,
13 filed a motion as well; so that -- that is, I believe,
14 currently before the Court awaiting a response from plaintiffs.

15 THE COURT: All right. From your perspective,
16 Mr. Greene, is there some way that I can manage these more
17 efficiently or that you can manage them more efficiently by
18 combining any of the aspects of the case, or is it, as Mr. Park
19 says, not really helpful?

20 MR. GREENE: Well, I know that we have already taken
21 steps to make this more efficient by moving -- we asked for a
22 consolidation for the motions with respect to these high-level
23 supervisors because the allegations against them are all
24 substantially similar throughout the cases. So that is
25 efficient from that perspective.

1 With respect to the allegations involving specific
2 incidents and what line-level officers were involved, I guess I
3 would have to defer to Mr. Park on that. It would seem to me
4 that you could do discovery -- if you are alleging different
5 incidents on different days, maybe you can't really do -- if
6 you're focusing on those sole incidents, maybe you can't do a
7 consolidated discovery on that if you are just looking at
8 discrete incidents, but -- but maybe you can. I'm not sure.

9 But certainly with respect to the high-level supervisors
10 that have been sued, we -- we are -- we have consolidated and
11 we've moved on behalf of all of those in one motion because the
12 allegations against them are substantially similar to the
13 allegations before the Court today in this case.

14 THE COURT: All right. So I appreciate that. If
15 there is -- so I won't do anything about it today. It's
16 just -- if either I find or you find that it is more efficient
17 to combine some of the aspects of the cases, you know,
18 certainly I would like to come up with the most efficient way
19 to do it. So keep that in mind as you move forward.

20 And if I'm seeing the same motions in every single case
21 boilerplate, then I think I would prefer to do it as one, even
22 though -- understanding that they are -- might have some
23 different claims that would warrant a different result. It
24 doesn't always have to be all exactly the same.

25 Mr. Clendenen, I did not ask you whether you weigh in on

1 this. I know you're involved in some of the discovery issues.
2 Is there anything you wanted to say about consolidating some of
3 the cases?

4 MR. CLENDENEN: Your Honor, I don't really have
5 anything to add. With the exception of the Clark case, I'm
6 only involved in the cases that have claims for injunctive
7 relief. So the ones that you listed, I don't have any
8 oversight over it, at least at this time.

9 THE COURT: All right. Understood.

10 All right. So, Mr. Greene, is there anything else you
11 wanted -- you think I need to address today?

12 MR. GREENE: No, Your Honor. Thank you for your
13 time.

14 THE COURT: All right. And, Mr. Clendenen, anything
15 from you?

16 MR. CLENDENEN: No, Your Honor.

17 THE COURT: And, Ms. Dahab, I already asked you, but
18 last word? No?

19 MS. DAHAB: Nothing further from us. Thank you,
20 Your Honor.

21 THE COURT: All right. Thank you, everybody. We'll
22 be in recess, and I hope to have a decision out to you quickly.

23 And we'll do a minute order just regarding the discovery.
24 Thank you so much.

25 MS. DAHAB: Great. Thank you.

1 MR. CLENDENEN: Thank you.

2 MR. GREENE: Thank you, Your Honor.

3 (Hearing concluded.)

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1 C E R T I F I C A T E

2 Angelica Clark, et al. v. Chad Wolf, et al.

3 3:20-cv-01436-IM

4 Telephonic Status Conference

5 January 12, 2022

6 I certify, by signing below, that the foregoing is a true
7 and correct transcript, to the best of my ability, of the
8 telephonic proceedings heard via conference call, taken by
9 stenographic means. Due to the telephonic connection, parties
10 appearing via speakerphone or cell phone or wearing masks due
11 to coronavirus, speakers overlapping when speaking, speakers
12 not identifying themselves before they speak, fast speakers,
13 the speaker's failure to enunciate, and/or other technical
14 difficulties that occur during telephonic proceedings, this
15 certification is limited by the above-mentioned reasons and any
16 technological difficulties of such proceedings occurring over
17 the speakerphone at the United States District Court of Oregon
18 in the above-entitled cause.

19 A transcript without an original signature, conformed
20 signature, or digitally signed signature is not certified.

21

22 /s/Jill L. Jessup, CSR, RMR, RDR, CRR, CRC

23

Official Court Reporter
Oregon CSR No. 98-0346

Signature Date: 1/26/2022
CSR Expiration Date: 9/30/2023

24